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No. 81-2386

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

PHILIP DEL COSTELLO,

Petitioner

Vs.

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, et al.,

Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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Pursuant to Rules 34.4 and 35.3 of the Supreme Court, petitioner, Phillip Del Costello, hereby submits his reply brief on the merits.

ARGUMENT

In their various briefs, respondents and their supporting Amici Curiae disagree over some of the details, but they are united in one assertion. They appeal one and all to the national policy favoring the rapid disposition of labor disputes as a reason to select the shortest possible statute of limitations, governing all actions.

We believe the respondents' focus is myopic and their focus ignores important labor policies.

As the Court ruled after our brief was filed in Bowen v. Postal Workers, 51 U.S.L.W. 4051 (January 11, 1983), the duty of fair representation is an essential protection for workers who are compelled by government action to surrender their bargaining rights to the collective representatives of their fellow employees. Thus, this case requires the Court to reconcile two contrasting policies -- the national interest in peaceful resolution of labor disputes and the individual

right not to be treated unfairly by a labor relations system which is the product of detailed government regulation. In their rush to limit the time to file suit, respondents pay heed neither to the rights which they would delimit nor to the practical effect on those rights of the limitations which they request.

In this reply brief, we attempt to return the statute of limitations debate to its broader context. We first recall the purpose of the duty of fair representation, which respondents do not even deign to mention. We then show that, in practical effect, the limitations period sought by the Respondents will defeat the purposes of the substantive law which it would govern, although it is not necessary to serve the purposes by which they seek to justify it.

Finally, we show that our argument for 10(b) is properly before this Court, and that the rule of Mitchell v. UPS, 451 U.S. 56 (1981),

should not be applied retroactively.[1]

I

A SIX-MONTH LIMITATION PERIOD REFLECTS A MORE FAIR BALANCE OF THE STATUTORY POLICIES AT STAKE THAN FOES AN ARBITRAL PERIOD.

As justification for using in hybrid actions the extraordinary short statute of limitations which is applied by most states to actions to vacate an arbitration, respondents rely upon the national labor policy favoring the expeditious resolution of labor disputes. Expeditious resolution, however, is not the only aspect of the national labor policy. Fundamental fairness to employees, particularly in the light

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1. Local 557's argument is inaccurate and disingenious when it suggests (brief, at page 10) that Del Costello has abandoned this issue of a distinct limitation for unions, because this case has been consolidated with Steelworkers v. Flowers, in which that is the principal issue, so we have left that argument to the respondents in that case.

of the statutory imposition of a bargaining representative selected by a majority of employees is a value of equal, if not overriding, importance. The statutory period favored by respondents pays no heed to this aspect of the national labor policy which is responsible for judicial recognition of hybrid actions by individual employees for breach of duty of fair representation and of a collective bargaining agreement.

Indeed, as we show in Part A below, respondents' proposed period would, as a practical matter, eviscerate the cause of action it would govern. Moreover, this evisceration is not required to serve the interest in speedy and peaceful dispute resolution for the consequences of which respondents grossly overstate, as we show in Part B.

I-A

AN ARBITRAL LIMITATION PERIOD WOULD EVISCERATE THE DUTY OF FAIR REPRESENTATION AND THE RIGHT TO VINDICATE CONTRACTUAL CLAIMS WHEN THAT DUTY HAS BEEN VIOLATED.

The easiest way to assure the speedy resolution of disputes over grievances concerning the application of collective bargaining agreements would be to rule that arbitrations or union refusals to support an individual's grievance are final, without respect to the adequacy or fairness of the union's exercise of its exclusive control over employee access to the grievance procedure. In that fashion, both the union and the employer, as well as the employees, would be certain of their proper resolution of the dispute as soon as the grievance procedure was concluded, or as soon as the union decided against processing a grievance. That solution, however, has repeatedly been repudiated by this Court.

Thus, in Vaca v. Sipes, 386 U.S. 171 (1967), the Court recognized that the effect of the labor relations system which is strongly encouraged by federal law is to subordinate an individual

employee's right to seek an individual bargain with his employer to the collective interest of all employees in the bargaining unit. Considerations of both constitutional law and elementary justice thus give rise to the duty of fair representation, which has

> stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law. 386 U.S. at 182.

See also IBEW v. Foust, 442 U.S. 42, 46-47 (1979). Even if there were only a small group of cases in which employees were thus deprived of any recourse, the purpose of this doctrine would be frustrated. As this Court stated, id. at 182-183,

> "To leave the employee remediless in such circumstances would be a great injustice." Id. 386 U.S. at 185-186.

Time and again, the Court has reiterated these principles and refused requests by unions and employers to restore their unreviewable

control over the grievance procedure. In Czosek v. O'Mara, 397 U.S. 25 (1970), the Court affirmed the right of employees to proceed against the union even if they chose not to pursue any claim against the employer. See also Bowen v. Postal Service, 51 U.S.L.W. 4051 (January 11, 1983). In Hines v. Anchor Motor Freight, 424 U.S. 554 (1976), the Court held that a union and an employer cannot avoid liability for their respective violations of the duty of fair representation and the collective bargaining agreement simply because an employee has, as the case law expressly requires, processed his grievance through arbitration. The Court quoted approvingly the words of the Court of Appeals for the Ninth Circuit:

> "For us, it makes little difference whether the union subverts the arbitration system by refusing to proceed as in Vaca or follows the arbitration trail to the end, but in so doing subverts the arbitration process by failing to fairly represent the employee. In neither case

> does the employee receive fair representation."
> 424 U.S. at 572, quoting Margetta v. PamPam Corp., 501 F.2d 179, 180 (1974).

The short arbitration statute which respondents would apply to hybrid actions would, for all practical purposes, prevent all but a few employees from pursuing claims which have been subverted in the arbitration process. A brief comparison of the typical arbitration process and the industrial grievance procedure plainly demonstrates why a short limitation period, although clearly appropriate for challenges to an arbitration by the parties who participated in it, is plainly unsuited for employee hybrid actions.

Arbitration is generally considered to be an informal cousin of a judicial proceeding. In the typical arbitration, each party participates in the proceeding through a representative whom it has itself chosen for the purpose. The representative is subject to instructions concerning

which arguments will be presented and must consult with the party; similarly, each party is entitled to attend the proceeding. The various legal and factual arguments about the alleged contractual or other controversies are thoroughly aired. If an action to vacate the arbitral award follows, the issues in the judicial proceeding will almost certainly be a replay of those which were advanced before the arbitrator, whether they relate to the fairness of the proceeding, the extent of the arbitrator's authority, or the arbitrability of the controversy.[2]

Moreover, both parties will normally be represented in the action to vacate by the same counsel who handled the arbitration. It is almost unheard of for a party to seek vacation of

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2. In addition, during the course of preparing for the arbitration counsel will undoubtedly learn, if they do not already know, of the extraordinarily short time allowed for an action to vacate the award.

an award because of malpractice of the party's attorney in handling the arbitration. Accordingly, it is perfectly fair to all parties concerned to require a discontented party to appeal from the arbitrator's decision in an amount of time which is roughly comparable to the time allowed for appeal from an adverse judicial decision.

These features are almost wholly absent from grievance arbitrations. First, an employee whose grievance is taken to arbitration has no choice of representative. Even assuming that the employee has voted in favor of the union itself in a certification election, the union cannot be replaced for the duration of the collective bargaining agreement. General Cable Corp., 139 N.L.R.B. 1123 (1962). Nor may the employee select among individual union agents or counsel. Malone v. Postal Service, 526 F.2d 1009 (Sixth Circuit, 1979).

The second difference pertains to the extent of the employee's right to control the conduct of the arbitration itself. The employee has no right to dictate the manner in which his representative will conduct the hearing -- Findley v. Jones Motor Freight, 639 F.2d 953 (Third Circuit, 1981), Ness v. Safeway Stores, 598 F.2d 558 (Ninth Circuit, 1979), Schleper v. Ford Motor Co., 107 LRRM 2500, 2503; or to be told what is being done with his grievance. Whitten v. Anchor Motor Freight, 521 F.2d 1335, 1341 (Sixth Circuit, 1975). Indeed, the employee does not even have the right to attend the arbitration or to know when it will be held. Welch v. Mason Dixon Lines, 509 F.Supp. 1069, 1071 (E.D. Tenn., 1980). Thus, it is entirely possible that, at the end of the arbitration period, the employee will be unfamiliar with the contentions of the parties concerning the employer's alleged breach of contract. It is therefore

unfair to expect the employee to rush into court as quickly as an aggrieved party to an ordinary arbitration.

Third, although the issues which will arise in the employee's 301 action against the employer may have been developed and aired during the arbitration, it is more likely that they have not, for no action is available unless the union has not provided fair representation. Even more important, however, is the fact that the issues vis-a-vis the union, concerning the adequacy of its representation, will not have been developed at all. There is no parallel in the normal context to develop the law and facts for the case before filing a complaint.

Finally, and most devastating to the employee who seeks to file suit against his union and employer, unlike the typical plaintiff seeking to vacate an arbitration, a worker must find an attorney to handle the suit. Not only can the

employee not rely on his former representative who has developed the necessary expertise concerning the facts and law pertaining to the contractual dispute; the worker can not even insist that information be furnished to the new representative. Indeed, given the fact that this data will be used to collect damages from the union which represented him, it is exceedingly unlikely that the union will knowingly furnish any assistance at all.

The process of finding an attorney and preparing a complaint provides additional reasons not to use standard arbitral limitation periods such as thirty days. There are a large number of lawyers who practice commercial law and are available to handle arbitration suits, either for defendants or for plaintiffs. By contrast, given the polarization of the labor bar, most practitioners find it difficult to represent both individual workers and either

unions or management. It can be readily seen that, as a result, there would be few attorneys who are both familiar with the intricacies of labor law and willing to take fair representation cases for plaintiffs. Assuming that the employee is able to find someone, a fair amount of time will necessarily be consumed just coming up to speed on the law, not to speak of investigating the facts to decide whether there is a tenable case. Inasmuch as defendants' costs and fees may be assessed against plaintiffs or their counsel in DFR cases, e.g., McCandless v. Great A&P Tea Co., 697 F.2d 198 (Seventh Circuit, 1983), counsel are normally unwilling to go forward without a preliminary investigation. Nor, for that matter, will counsel be willing to proceed, even with the investigation, until the employee has been able to provide compensation. This alone takes a fair amount of time for a discharged worker, particularly because the difficulties of

litigating fair representation cases and their very high risk tend to make contingent fee arrangements unattractive to lawyers.

For all these reasons, application of limitation periods which were developed for the vacation of normal awards in arbitrations would be wholly unsuitable for employee actions under Vaca and Hines. Indeed, the practical effect of such limitation periods will be to make the duty of fair representation all but unenforceable. The elimination of an individual's remedies without providing an adequate alternative would resurrect the constitutional due process problems which give rise to the duty of fair representation in the first place. Such limitation periods are made all the more unjust because they are unnecessary to serve other aspects of the national labor policy, an issue to which we now turn.

I-B

THE NATIONAL LABOR POLICY FAVORING EXPEDITIOUS AND PEACEFUL RESOLUTION OF DISPUTES DOES NOT REQUIRE ADOPTION OF ARBITRAL LIMITATION PERIODS.

The principal justification advanced to support borrowing arbitral limitation periods is that any longer period would allegedly disrupt the peaceful resolution of disputes through the grievance and arbitration procedure. This contention has never been satisfactorily documented; indeed, it has simply been made ex cathedra. We here show that, to the contrary, the allowance of a fair representation suit to attack arbitrations for a reasonable period following the award has no significant effect on the grievance and arbitration system.

Indeed, the statistics available from the Federal Mediation and Conciliation Service show that in the years following this Court's recognition of a post-arbitral cause of action in

Hines, the number of grievances taken to arbitration increased steadily. (FMCS Thirty-fourth Annual Report, Table 22, pp. 42, 43.

During these years, before UPS v. Mitchell, most courts applied a non-arbitral limitation period; yet, this longer period obviously did not discourage unions or employers from using arbitration to settle their disputes. Significantly, however, in the fiscal year beginning July 1, 1981, after Mitchell was decided, the number of arbitrations dropped precipitously. FMCS Thirty-fourth Annual Report, Table 22, pp. 42, 43.) Although we do not suggest that Mitchell discouraged arbitration, we do believe a more convincing case needs to be made for the necessity of short arbitration periods before the effects of such periods on the enforceability of the duty of fair representation are incurred.

The absence of a statistical correlation

is not surprising when one recalls the content of most fair representation cases. The unions and employers base their claims of disruption of the grievance arbitration system upon the theory that a longer statute impedes the ability of the parties to rely upon that system to give meaning and content to the collective bargaining agreement by adding to the "law of the shop". In fact, however, as we discuss in more detail below, grievances that give rise to hybrid actions tend to be primarily factual rather than precedential in nature; they tend to involve individuals rather than groups; and they are such a small fraction of the total number of grievances as to lack substantial impact upon the system as a whole.

First, although many grievances involve questions of the meaning of a collective bargaining agreement, those grievances tend not to be litigated in hybrid actions. The reason for this

is that the duty of fair representation pertains primarily to union failures to do an adequate job of investigating the facts, or to conscious decisions to kill a grievance for arbitrary, capricious or invidious reasons which are unrelated to the interest of the bargaining unit as a whole. However, when the union makes a conscious decision to trade off the interests of some workers in order to advance the interests of a different segment of the bargaining unit -- i.e., when the decision will have precedential effect on the law of the shop -- that is an exercise of discretion which is wholly consistent with the duty of fair representation. Humphrey v. Moore, 375 U.S. 335, 350 (1964), Ford Motor Co. v. Huffman, 345 U.S. 330, 337-339 (1953).

For similar reasons, hybrid suits tend to involve individuals rather than groups of workers. When the union has refused to process a grievance for a group of workers, it is more

likely that its reasons for refusing to do so involve a conscious trade-off rather than invidious hostility or capricious disregard of the interest at stake. These latter impermissible factors are more likely if a single individual's discharge is at stake and, in fact, there are more hybrid actions involving single discharges where the issue is simply whether there was good cause to support the discharge than those involving any other category of grievance.

Finally, because most unions represent their members not only fairly but extremely well most of the time, it is only an insignificant fraction of all grievances which ultimately are litigated in a hybrid action. Although no precise figures are available, Professor Feller roughly estimated that some one or two million grievances are submitted every year. (Feller, A General Theory of the Collective Bargaining Agreement, 61 Calif. L.Rev. 663, 755 (1973))

Estimates of the number of grievance arbitrations range widely, from the vicinity of 7,000 by the FMCS, to "upwards of 10,000" by the National Academy of Arbitrators, to "as many as 100,000". See FMCS Thirty-fourth Annual Report 42 (1982); Feller, at p. 755 and n. 397.[3]

By comparison, because most unions, most of the time, provide representation which is not merely adequate but highly effective, hybrid actions number in the low hundreds. We are unaware of any precise figures, but the petition for certiorari in Flowers provides a fair indication. The AFL-CIO sought to assemble a comprehensive list of current prearbitration and post-arbitration fair representation cases in order to persuade the Court of the importance of the questions

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3. The figure would be higher if Teamster joint committee decisions are included, inasmuch as every Teamster grievance is submitted to such committees for disposition.

presented in its petition. The list, assembled by asking for cases from all members of the AFL-CIO lawyers organization, includes some 52 cases in which timeliness issues were decided. (Cert. pet., at pp. 9-11, n. 3, and 60 actions in which limitations issues have been raised but not yet decided; cert. pet. at 23a-24a.)[4] Even assuming that there have been two or three times as many cases filed in the last two or three years, the period covered by the AFL-CIO list, the number of pre and postarbitration cases nevertheless remains negligible, a fraction of one percent of the total number of arbitrations, and perhaps .01% of the total number of grievances. Moreover, in light of the high standard which must

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4. The list includes only cases in which timeliness issues were raised. However, in light of Mitchell, it is inconceivable that a defendant would refrain from raising a limitations defense. Accordingly, the list in the certiorari petition is probably comprehensive.

be satisfied in order to prevail on the fair representation claim, only a small percentage of these cases are ultimately won. Accordingly, it is difficult to believe that the claims of unions and employers that the adoption of one limitations period or another would constitute a significant threat to the industrial grievance and arbitration system.

In summary then, application of limitation periods such as six months pose no threat to the stability of the grievance and arbitration system. Any inconvenience they cause is far outweighed by the need to provide an effective remedy for breaches of the duty of fair representation and of the underlying contractual obligations which go unremedied because of the union's breach. Accordingly, arbitral limitation periods should not be imposed as a device to cut off almost all hybrid actions; the more realistic six-month period should be borrowed

from 10(b).

I-C

THE 10(b) ISSUE IS PROPERLY BEFORE THE COURT IN THIS CASE AS OUTLINED ABOVE.

Both Local 557 and Anchor Motor Freight urge the Court not to reach the applicability of a six-month statute of limitations by analogy to the NLRA on the theory that the issue is not properly presented here. They argue, first, that Del Costello failed to raise the argument below and, second, that a six-month limitations period has run. These contentions are based on selective quotations from the record below and upon a faulty analysis of the applicable law.

With respect to the alleged failure to argue 10(b), there is no question that, absent exceptional circumstances, this Court will not consider a question not raised in the Court of Appeals. United States v. Ortiz, 422 U.S. 891,

898 (1975); Adickes v. Kress & Co., 398 U.S. 144, 147, n.2 (1970); Neely v. Eby Constr. Co., 386 U.S. 317, 330 (1967). However, Del Costello's brief in the Court of Appeals thoroughly discussed the 10(b) issue (J.A. 282-290), and the union and employer fully responded (J.A. 291-297).[5]

The limitations defense, which depends upon which statute should be borrowed, is purely a question of law, which has been fully briefed

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5. They also argue that the issue was not preserved in the District Court. No such contention was raised in the Court of Appeals. Del Costello argued that although the District Court might be reluctant to decide the 10(b) issue which this Court has refrained from addressing, the unconstitutionality of applying Maryland's thirty-day arbitration period counseled in favor of either 10(b) or a longer state statute. (J.A. 275-276.) He also urged that his complaint was timely under 10(b) because the statute had been tolled by his efforts to exhaust his contractual remedies. (J.A. 264-276.) In fact, Del Costello cited this Court's concurring opinions in Mitchell advocating 10(b) before the District Court and also stated that either 10(b) or the Maryland Uniform Arbitration Act are the appropriate statutes to apply, if any. (J.A. 263, 264, 275, 276.)

both in this Court and below, and it would serve no useful purpose to refuse to address it simply because Respondents wish that it had been discussed at even greater length below. Cf. Bellotti v. Baird, 428 U.S. 132, 142, n.10 (1976).

The contention that the applicability of 10(b) is not properly before the Court because Del Costello would allegedly still be untimely is equally devoid of merit. Del Costello was required by this Court's decision in Republic Steel v. Maddox, 379 U.S. 650 (1965), to fully exhaust his contractual grievance procedures before filing suit. When on August 19, 1977 -- less than seven months before the Complaint was filed -- he received from Local 557 a copy of the joint committee's decision with an invitation to submit proposed corrections at the joint committee's meeting on September 20, 1977 -- less than six months before the complaint was filed -- Del Costello

reasonably concluded that this was an additional opportunity to use the contractual grievance procedure, which under Maddox he was required to exhaust. He therefore responded with a letter demonstrating that evidence had been improperly considered, was false, and did not support his discharge.

Now the union and employer tell him -- as they failed to do in response to his letter -- that he really didn't have an additional opportunity to exhaust, that the contractual procedure was concluded, that the opportunity to correct the joint committee's report was only a formality, and that, if his letter be construed as a request for reconsideration, it either could not be considered or was not made with sufficient formality. Factual support for these appellate arguments are curiously absent from the record below, and both respondents never responded to petitioner's affidavit before the

District Court despite the fact that they had time and opportunity to do so. If the respondents desired to resolve the factual dispute they raised for the first time before this Court, they should have done so before the District Court by filing an appropriate reply affidavit coupled with subsequent discovery, which they failed to do despite the express invitation of the petitioner. (See page 9, reply brief to opposition to cert. pet. in this case.) The contract is silent on the question of whether the joint committee's decision becomes final when it is rendered, when the parties are notified, or when the minutes are approved. (Article VII, Sec. 6; J.A. 211-212.) None of these questions appear in the record and are appropriate for consideration only by the trier of fact on remand.

However, the significant factual question is whether Del Costello's belief to the contrary

was unreasonable. Santos v. Carpenters District Council, 619 F.2d 963 (Second Circuit, 1980). The District Court did not expressly resolve this factual question, nor could it on a Motion for Summary Judgment. Rather, assuming, as it was required to do that Del Costello's time to file was tolled by his reasonable belief that he was still in the process of exhausting contractual procedures, the District Court ruled that suit was filed untimely on March 16, 1978, because it was more than thirty days after the union told him that the joint committee's decision had become final in late December 1977. (See pet. for cert., B-25, 27.)

In this posture, the Court should not refuse to decide the 10(b) issue on the theory either that the joint committee decision became final before September 20, 1977, or that Del Costello either knew or reasonably should have known before December of 1977 that the grievance

procedure had been concluded.

I-D

THE RULES OF DECISION ACT SHOULD NOT BAR THE SELECTION OF 10(b) BY THIS COURT IN THIS CASE.

Although the respondent, Local 557, has not invoked the Rules of Decision Act (28 U.S.C. 1652), Anchor places heavy reliance upon the statute as the basis for urging this Court to refrain from selecting 10(b) of the N.L.R.A. as the appropriate limitation period (pp. 13-18 of Anchor's brief).

This Court has interpreted the Rules of Decision Act to require the application of state law only when the state is the source of the substantive right to be enforced in order that uniformity may be achieved within the state. Holmberg v. Armbrecht, 327 U.S. 392 (1946, Frankfurter, J.); Guarantee Trust Co. v. York, 326 U.S. 99 (1945); Clearfield Trust Co. v. U.S.,

318 U.S. 363 (1943); 76 Harvard Law Review, pp. 1306, 1307 (1963). Since the source of the hybrid cause of action based upon breach of duty of fair representation is derived from the National Labor Relations Act and Labor Management Reporting Act, all of which are federal statutes and, more particularly, since the hybrid cause of action was judicially implied from the NLRA (see Vaca v. Sipes, supra), and argument in petitioner's brief (pp. 12 through 23), no extended analysis is required to demonstrate that the Rules of Decision Act does not apply to these issues.

I-E

MITCHELL SHOULD NOT BE APPLIED RETROACTIVELY.

The union and company urge that UPS v. Mitchell, supra, should be given retroactive application. Although they do not deny that the

majority of Circuits before Mitchell had expressly rejected arbitral periods, they perform a detailed dissection of the pre-Mitchell cases to show that, with the benefit of hindsight provided by Mitchell, counsel should have been able to distinguish many of them. In other cases, they argue, neither the union nor the employer ever raised an arbitral limitations period.

But that, we submit, is the very point. It is often easier to discover in hindsight a historic trend in the law than it is to know which way the law is going in the heat of the battle. The very facts that almost nobody raised arbitral limitations defenses and that, as we pointed out in our opening brief at pp. 46, 47, none of the many commentators who addressed the subject suggested an arbitral period, is cogent evidence that counsel here were reasonable when they concluded that a contract or tort limitations period would be applied. Indeed, no satisfactory

explanation is offered for the fact that even respondents' learned counsel did not pursue the arbitral theory until two months after the issuance of the first and only appellate decision to anticipate Mitchell, Liotta v. National Forge Co., 629 F.2d 902 (Third Circuit, 1980), and one month after this Court's grant of certiorari in Mitchell made that theory seem tenable.[6]

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6. Anchor lamely alleges in its n.8 that at a status conference the parties agreed, and the court ruled, that there would be no summary judgment motions until discovery was completed. There is no record citation and, in fact, the contention falsely implies that the respondents were compelled to proceed through thirty-three months of discovery and were not at liberty to raise legal arguments dispositive of the entire case. In one of the scheduling conferences, the District Court Judge simply established the customary procedures for expediting litigation. If respondents indeed believed that they had a viable limitations defense prior to Liotta and Mitchell, they could have raised the question at any time by a motion to dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure, as suggested by Chief Judge Harrison Winter during appellate argument.

The union and employer further argue, based upon Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 418 (1968), that whenever the law is "murky", Local Br. at 17, the parties rely on the lower court interpretations of the law "at their peril". Local Br. at 18; see also Anchor Br. at 34. In Hanover Shoe, however, the Court found it unnecessary to pass on the possible prospective application of decisions in civil cases. When it did reach that question three years later in Chevron Oil Co. v. Huson, 404 U.S. 91 (1971), and in the later cases cited in our opening brief, it ruled not only that prospectivity is appropriate in "new principles of law" cases, as well as in "overruling clear past precedent" cases, but also a failure to anticipate the Court's eventual decision has been held "reasonable". (Br. at pp. 43, 44.) Nor did Hanover Shoe involve, as does this case, the extinction of a cause of action which has always

been a strong argument for prospectivity in this Court's cases.[7]

The union and employer barely respond to our arguments concerning the second and third elements of the Chevron test. They are able to argue that the operation of the national labor relations policies will be retarded by prospectivity only by ignoring every aspect of the national labor policy save the interest in curbing hybrid actions as much as possible. And their principal response to our equitable argument seems to be that because the Court did not expressly address retroactivity in Mitchell, it must necessarily have considered the equities and conclusively determined that retroactive

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7. Although Local 557 suggests that Holzanger v. Valley Hospital, 646 F.2d 792 (Second Circuit, 1981), is to the contrary, as Judge Meskill there observed (p. 798), that case is squarely within the principle barring prospectivity of jurisdictional rulings.

application would not be unfair. These contentions have been answered by our brief to the extent that they are not self-refuting.

Because Mitchell established a new principle of law which Del Costello reasonably did not anticipate, and because retroactive application not only is unnecessary to promote the national labor policy but would be unfair to employees like Del Costello, Mitchell should be limited to prospective application.

II

THE TEAMSTERS' PLEA FOR A SIX-MONTH LIMITATION PERIOD FOR PRE-ARBITRATION CASES SHOULD BE REJECTED.

Both cases before the Court involve grievances which were taken to arbitration. The amicus brief of the International Brotherhood of Teamsters nevertheless asks the Court for a broader ruling which, although borrowing

state arbitral limitations periods for post-arbitration hybrid actions, borrows the six-month period of Section 10(b) to govern hybrid actions which contest a union's failure to process a grievance.[9] We do not believe that this question is properly before the Court, However, in the event that the Court chooses to reach out to address the issue in dictum, we discuss it briefly here.

In short, we object to the Teamsters' attempt to have it both ways -- state limitation periods for post-arbitration cases and Section 10(b) for pre-arbitration cases.

There are several considerations applicable in the pre-arbitration context which make Section 10(b) far less appropriate there than in

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9. It is indeed strange that the International raises this issue, because the Teamsters customarily take every grievance, regardless of merit, to the joint committees, which they treat as a form of arbitration.

than in the post-arbitration situation.

First, insofar as an unusually short statute of limitations is based on the desire to provide prompt assurance of the legitimacy of the resolution of grievances, employers' and unions' expectations of finality are less legitimate in the pre-arbitration context. Of course, they may equally believe in both contexts that the resolution is "final" as between themselves. Indeed, even if there is no grievance procedure at all, the employer may safely conclude that a discharge is "final" insofar as an employee's contractual remedies are concerned. We submit, however, that the reason why expectations of finality were deemed by the Court in Mitchell to be particularly legitimate, and therefore especially worthy of immediate confirmation as final, even as against a possible fair representation claim, is that the grievance has been aired before a neutral third party, who has considered the

facts and arguments presented by both sides, and ruled accordingly. This guarantee of fairness is missing when the grievance has not been taken to arbitration, not to speak of cases where the union has never even processed the grievance in the first place. An unusually short limitations period is therefore not warranted.

Second, a statute of limitations need not be unusually short in the pre-arbitration context in order to provide assurances of finality as rapidly as in the post-arbitration context. By the time a grievance has resulted in an arbitration award, FMCS data show approximately two-thirds of a year on the average has elapsed since the grievance was filed. Bowen v. Postal Service, 51 U.S.L.W. 4051, 4057 n.4 (1983). Many grievances take even longer to reach arbitration. By requiring in Mitchell that a hybrid action be filed within three months, the Court gave

assurance that employers and unions could be sure of the finality of a dispute within about a year of the time when it arose. A six-month statutory period for pre-arbitral suits is unnecessary to provide such rapid assurance of finality.

Finally, the employee plaintiff in a pre-arbitral hybrid action faces a significant procedural hurdle -- internal union exhaustion -- which must be overcome before suit is filed, and which necessarily causes substantial delays in the initiation of litigation. In Clayton v. UAW, 451 U.S. 679 (1981), the Court ruled that before a union member may complain that his union has failed to process a grievance, he must use internal union remedies to appeal the refusal, so long as the remedies available through the internal procedures were equivalent to the remedies available in the Section 301 action and so long

as using those procedures would not otherwise be futile.[10]

In deciding whether or not to exhaust internal union procedures, the employee is thus placed in a cruel dilemma. If he fails to exhaust, the district court may, in its discretion, determine that exhaustion would not have been futile. If, on the other hand, the employee does exhaust, then the statute of limitations may run out during that period.

Of course, it is a partial solution to this last problem to hold that the statute does not begin to run so long as the employee is

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10. Most district courts would dismiss with prejudice, e.g., [cites] although the Court indicated in NLRB v. Marine Workers, 391 U.S. 418 (1968), that exhaustion doctrine only permits the courts to "stay their hands". 391 U.S. at 426. See also Clayton v. UAW, 451 U.S. 679, 688 (1981) ("policy of deferring judicial consideration"); Chadwick v. IBEW, F.2d. (D.C. Cir. 1982).

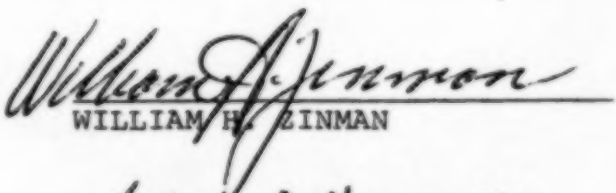
making reasonable efforts to exhaust internal union procedures. E.G., Santos v. Carpenters District Council, 619 F.2d 963 (2d Cir. 1980). Even in that case, however, if the employee fails to guess when the court would decide that exhaustion was not reasonable, and therefore unnecessary, he runs the alternate risk of dismissal for exhaustion or for limitations reasons.

For these reasons, if the Court chooses to address the appropriate limitations period for pre-arbitrations suits, it should reject the Teamsters' proposal.

CONCLUSION

For the foregoing reasons, and for all reasons listed in our opening brief, the decision of the Court of Appeals should be reversed and the case should be remanded for trial on the merits.

Respectfully submitted,



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